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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | 94-109 |
| Statement of the Public Utilities | ) | |
| Commission of Ohio's Intention to | ) | PR File No. 94-SP7 |
| Preserve Its Right For Future Rate and | ) | |
| Market Entry Regulation of | ) | |
| Commercial Mobile Radio Services | ) | |

To: The Commission

## OPPOSITION OF McCAW CELLULAR COMMUNICATIONS, INC.

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September 19, 1994

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To: The Commission

## OPPOSITION OF McCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"),[1/] by its attorneys, hereby submits its opposition to the above-captioned petition ("Petition") filed by the Public Utilities Commission of Ohio ("PUCO").

### Introduction and Summary

In the Second Report and Order,[2/] the Commission established a sound regulatory foundation for the continued growth and development of commercial mobile radio services ("CMRS"). The Commission correctly concluded in that proceeding that existing market conditions, together with enforcement of other provisions of Title II, render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect

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[1/] McCaw provides cellular service to more than 2.5 million subscribers in 24 states, including Ohio.

[2/] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994) ("Second Report and Order").

consumers. The Commission found that imposing these requirements on cellular and other CMRS providers would not serve the public interest, and that forbearance from unnecessary regulation of CMRS providers would enhance competition in the mobile services market.[3/]

Finally, the Commission assured that like mobile radio services would be subject to consistent regulatory treatment. Evaluated against these principles, the above-captioned Petition must be

Second, Ohio has utterly failed to make the substantial showing required to justify the authority it seeks in the above-captioned proceeding. Rate regulation is unnecessary in light of current and reasonably foreseeable market conditions. The Commission has already determined that the level of competition in the CMRS marketplace is sufficient to support broad forbearance from rate regulation. The PUCO has provided no evidence that the level of competition in Ohio departs significantly from the market conditions relied upon by the Commission, nor has it demonstrated that cellular carriers in Ohio have exercised market power.

The economic analysis put forward to support Ohio's claim for regulatory authority is fundamentally flawed. Ohio ignores the fact that cellular carriers will soon face competition from so-called enhanced specialized mobile radio systems ("ESMRs") and from licensees using the 120 MHz of spectrum recently made available for PCS; it ignores declining prices for cellular service and the substantial recent growth in subscribership and investment by cellular carriers; it attempts to "prove" market concentration by using analytical tools intended to evaluate mergers rather than the appropriateness of regulation; it concludes erroneously that cellular systems have excess capacity; and, in concluding that cellular carriers have enjoyed "excess" earnings, fails to recognize the scarcity value of the electromagnetic spectrum. At most, Ohio's flawed economic analysis demonstrates only that the CMRS marketplace is not perfectly competitive. But, as the Commission itself has acknowledged, perfect competition is not a necessary prerequisite for forbearance.

Third, Ohio erroneously asserts that the number of cellular resellers is indicative of the level of competition in the cellular marketplace. The number or financial health of cellular resellers is irrelevant to the statutory goal of ensuring that subscribers are assured of just,

reasonable, and nondiscriminatory rates. There is no evidence that facilities-based carriers are pricing wholesale service in a discriminatory manner. In any event, such carriers remain subject to the statutory prohibition on unreasonable discrimination. The appropriate remedy for a claim of discrimination is the complaint process rather than the imposition of burdensome and unnecessary rate regulations.

Fourth, Ohio fails to demonstrate that consumers would benefit from regulation. Price controls limit the ability of regulated firms to respond to changes in technology and in cost and demand conditions. Rate regulation also deters new investments, improvements in service quality, and new entrants in the marketplace. By seeking to impose rate regulation solely on cellular operators, moreover, Ohio would reestablish the very regulatory disparities that last year's comprehensive amendment of Section 332(c) of the Communications Act was intended to correct.

The public interest is better served by the regulatory forbearance embodied in the Second Report and Order and the introduction of additional competition through the allocation of new spectrum for CMRS, and Congress intended for these policies to be given "adequate opportunity to yield the [anticipated] benefits of increased competition and subscriber choice" before state rate regulation was imposed on CMRS providers.[6/] Given the acknowledged harms from such

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[6/] House Report at 261.

regulation and Ohio's failure to demonstrate the need to impose price controls on cellular carriers, the Petition should be denied.[7/]

## I. THE COMMISSION MUST REJECT OHIO'S REQUEST FOR OPEN-ENDED AUTHORITY TO REGULATE CELLULAR RATES AND ENTRY

The PUCO's Petition states that it is being filed "to preserve Ohio's right to petition the FCC at some point in the future for the purpose of additionally regulating the rate and/or market entry of commercial mobile radio service providers in the state of Ohio."[8/] The PUCO is not entitled to any authorization with respect either to entry or rate regulation.

### A. Section 332(c) Does Not Permit State Regulation Of Market Entry

The PUCO acknowledges that it does not currently regulate market entry of cellular carriers, or other commercial mobile radio service providers, but appears to seek a ruling that the state of Ohio may regulate market entry in the future. Such a ruling is beyond the power of the Commission to grant.

Section 332(c)(3) states categorically that "no State or local government shall have any authority to regulate the entry of or rates charged by any commercial mobile service".[9/] A state

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[7/] It is important to bear in mind that denial of the petition does not foreclose state regulatory authorities from returning to the Commission at a later date should evidence appear that consumers are indeed being injured because rate regulation is not being exercised at the state level. Thus, the burden of proof is properly placed on the petitioning state to show why free market forces should not be given a chance to operate now.

[8/] PUCO Petition at 6.

[9/] 47 U.S.C. § 332(c)(3)(A).

may petition for the authority solely to regulate rates.[10] The Act does not permit the filing or granting of a petition for state regulation of market entry.

### B. The PUCO's General Statutory Authority To Regulate Rates Is Not Grandfathered

The PUCO states that it "does not presently set rates or limit market entry,"[11] and makes no assertion that it regulated rates on June 1, 1993. Nonetheless, the PUCO Petition suggests that because the PUCO has general unexercised authority to regulate rates, this regulatory authority should be grandfathered. The PUCO provides no justification for continuing existing authority, however. In any event, neither the Communications Act nor the Commission's rules permit the grant of open-ended state authority over CMRS.

Section 332(c) preempts state rate regulation of commercial mobile services unless a state successfully petitions the Commission for authority to engage in such regulation under statutorily-established standards.[12] The statute provides for a limited "grandfathering" of pre-existing state rate regulations:

> (B) If a State has *in effect on June 1, 1993*, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may no later than 1 year after the date of enactment of the Omnibus Budget Reconciliation Act of 1993, petition the Commission requesting that the State be authorized to *continue exercising authority* over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A),

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[10] See 47 U.S.C. §§ 332(c)(3)(A) ("a State may petition the Commission for authority to regulate the rates for any commercial mobile service"), 332(c)(3)(B) (State may petition to be authorized to "continue exercising authority over rates") (emphasis supplied).

[11] PUCO Petition at 1.

[12] 47 U.S.C. § 332(c)(3).

remain in effect until the Commission completes all action (including any reconsideration) on such petition.[13/]

The language of Section 332(c)(3)(B) is clear on its face. The "existing regulation" referred to in the second sentence is simply a shorthand for the regulation "in effect on June 1, 1993" in the first sentence. This meaning is reinforced by the verbs "continue" and "remain in effect," which obviously refer to regulations that have become effective, not general authority to regulate which exists whether or not specific regulations are made effective pursuant to such general authority.[14/] Thus, during the pendency of a petition such as the instant one, Section 332(c)(3)(B) permits a state to continue to enforce only those rate regulations that were in effect on June 1, 1993. It does not permit the "grandfathering" of unexercised rate authority.

## II. THE PUCO'S PETITION TO RETAIN SPECIFIC EXISTING REGULATIONS IS NOT SUPPORTED BY ANY EVIDENCE WHATSOEVER AND MUST THEREFORE BE DENIED

In addition to seeking general authority to regulate rates and entry at some point in the future, the PUCO apparently seeks to retain two existing regulations of rates for cellular service. Specifically, the PUCO uses "its complaint authority . . . to ensure that rates of a cellular

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[13/] 47 U.S.C. § 332(c)(3)(B) (emphasis supplied).

[14/] The PUCO's apparently contrary interpretation violates basic canons of statutory construction. These include avoiding "any interpretation that renders any section superfluous and does not give effect to all of the words used by Congress." See Central Mont. Elec. Power Co-op, Inc. v. Bonneville Power Admin., 840 F.2d 1472, 1478 (9th Cir. 1988); United States v. Nordic Village, Inc., 112 S.Ct. 1011, 1015 (1992). It is also a "basic rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." Bonneville Power Admin., 840 F.2d at 1478; Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991).

wholesaler are not unduly discriminatory, preferential to its affiliates or set below cost for the purpose of inhibiting competition."[15/] The Petition also suggests that the PUCO currently entertains complaints with respect to cellular retail rates.[16/] Contrary to the PUCO's assertion, the consideration of complaints regarding wholesale and retail CMRS rates is a form of rate regulation that falls within the preemptive language of the Communications Act.[17/]

As a threshold matter, this opaque description of Ohio's regulatory regime fails to satisfy the Commission's clear requirement that a state petition "provide a detailed description of the specific existing or proposed rules" for which it seeks approval.[18/] This defect alone justifies denial of the Petition. Independently, the Petition does not even attempt to meet the demanding standard of proof for grant of petitions to retain existing regulations, and therefore must be denied.

### A. Section 332(c) And The Commission's Rules Impose An Extremely Demanding Standard For The Authorization Of State Regulation Of Cellular Services

The Second Report and Order sets forth the Commission's general analysis with respect to the level of competition in cellular markets, and makes fundamental policy choices with respect to appropriate regulation. These fundamental policy decisions, as well as the framework

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15/ PUCO Petition at 2.

16/ See PUCO Petition at 3 (PUCO may entertain complaints "brought by customers").

17/ If the PUCO takes no action in response to such complaints, there may be no rate regulation, but neither is there any "existing" regulation to grandfather. In any event, as demonstrated below, the PUCO has not met its burden of justifying any rate regulation.

18/ Second Report and Order, 9 FCC Rcd. at 1505.

established by Section 332(c), dictate that the grant of state petitions to permit entry, rate or tariff regulation should be very much the exception rather than the rule.

The Commission has found the CMRS market (including the provision of cellular service) sufficiently competitive to justify forbearance from rate and tariff regulation.[19/] Inasmuch as the Commission did not insist on perfect competition as a prerequisite for deregulation, the "substantial hurdles"[20/] that must be met by a state's request for authority to regulate cellular services cannot be satisfied with mere assertions of less than fully competitive conditions or a general need for regulation. Rather, the Second Report and Order suggests a three-part test, which each state is required to meet to satisfy its burden of proof on each part of the test.

First, to support a petition for rate authority, the petitioning state must show that market conditions unique to that state are substantially less competitive and substantially more likely to cause harm to consumers than the market conditions that have been found generally to support the Commission's decision to forbear from rate and tariff regulation.

Second, since the Commission expressly relied upon the continuing applicability of Section 201 and 202's requirements for just, reasonable, and not unreasonably discriminatory rates, and the availability of the complaint procedure under Section 208 to address any residual competitive problems,[21/] a state must demonstrate that whatever unique competitive problems it has identified cannot be adequately addressed through these Federal remedies.

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[19/] Id. at 1472, 1478-79.

[20/] Id. at 1421.

[21/] Id. at 1478-79.

Finally, in the unlikely event that a state can satisfy the factors described above, it must also show that any residual risks to consumers, i.e., the marginal benefits of the proposed state regulation, outweigh the substantial costs associated with regulation. The Commission generally found the costs of regulation to be substantial,[22] and sought to "avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course."[23]

Approval of a state petition that fails to meet this test would contravene the statutory framework, resulting in the imposition of rate regulation under circumstances in which the Commission itself has found such regulation to be unnecessary and counterproductive.

### B. PUCO Has Not Met Its Burden Of Proof With Respect To Its Existing Regulation Of Cellular Rates

The PUCO presents no evidence that rate regulation is necessary to protect consumers from unjust or unreasonable rates, the threshold standard it is required to meet, but merely speculates that whether or not market conditions protect subscribers "remains to be seen."[24] The PUCO makes no attempt to demonstrate the exercise of market power by cellular carriers, nor could it make such a showing. The PUCO also fails to show any benefits from its past regulation of cellular carriers, and its Petition ignores the substantial costs that rate regulation imposes upon service providers and the public.

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[22] Id.

[23] Id. at 1419.

[24] PUCO Petition at 2. See also Case 89-563-TP-COI, In Re Commission Investigation Into Implementation of Sections 4927.01-4927.05, Revised Code, as they relate to competitive telecommunication services, entered October 22, 1993. In that decision, the PUCO determined it was in the public interest to further relax its regulatory oversight of cellular carriers. Id. at 20-23.

By contrast, there is evidence of sufficient competitive behavior and consumer benefits in the CMRS marketplace to justify the preemption of economic regulation by the PUCO. The increasing competition in the CMRS marketplace further supports preemption of state rate regulation.[25/] Regulation can be justified only if there is evidence of market power or a likelihood that such power will be exercised in the future. There is no evidence that the CMRS marketplace in Ohio suffers from either defect.

The Petition indicates that PUCO uses its current authority "to ensure that rates of a cellular wholesaler are not unduly discriminatory, preferential to its affiliates, or set below cost for the purpose of inhibiting competition."[26/] It further states that it "seeks to foster competition in the cellular resale market."[27/] The PUCO offers no evidence to establish that this market is not competitive at present. More fundamentally, the PUCO makes no effort to demonstrate that policies intended to assist resellers have any relationship to just and reasonable rates for retail consumers. In fact, there is substantial evidence that wholesale rate regulation, and other policies designed to favor resellers, are unnecessary and costly.

The PUCO's goal to foster competition by cellular resellers is misguided. The number or health of cellular resellers is irrelevant to the statutory goal of ensuring that subscribers are assured of just, reasonable, and nondiscriminatory rates. There is no evidence that facilities-based carriers are pricing wholesale service in an unjust or discriminatory manner. In any event, such carriers remain subject to the statutory prohibition of unjust rates under Section 201

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25/ Second Report and Order at 1470.

26/ PUCO Petition at 2.

27/ Id. at 1.

of the Act and the prohibition of discriminatory rates under Section 202 of the Act. The appropriate remedy for a claim of unjust or discriminatory rates is the Section 208 complaint process rather than the imposition of burdensome and unnecessary rate regulations.

As an initial matter, it is fundamentally incorrect to assume, as the PUCO apparently does, that the level of competition in the CMRS market can be enhanced through policies designed to protect resellers. In order to reduce retail prices, a regulatory policy (other than direct retail price controls) must increase capacity and output in the market. Resellers simply do not add capacity.

Wholesale rate regulation has also been premised upon the concern that, in the absence of regulation, facilities-based carriers will inflate wholesale prices and run their retail operations at a loss in order to put independent resellers in a price squeeze. There is, however, no persuasive evidence that the exercise of market power by facilities-based carriers is a significant problem.[28/] In the absence of such evidence, there is every reason to believe that those carriers would have a strong incentive to have their retail marketing done in the least-cost manner, regardless of whether that involved independent resellers or vertical integration or both.[29/] Even if facilities-based carriers enjoyed market power, they would exploit their position most effectively by raising the price of their services rather than discriminating against resellers.[30/] To the extent that resellers play an important role in marketing the services of a facilities-based

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[28/] See Declaration of Bruce M. Owen, President, Economists Incorporated ("Owen Declaration"), attached hereto as Exhibit A, at ¶ 46. At McCaw's request, Economists Incorporated undertook an economic analysis of the need for and potential effects of state rate regulation of CMRS providers.

[29/] Owen Declaration at ¶ 46.

[30/] Id. at ¶ 48.

carrier, the latter's attempt to squeeze resellers would simply increase the costs of providing service to consumers.[31/]

In many cases in which a wholesale supplier offers service both through company-owned retail outlets and through independent resellers, complaints by the resellers are common. Their existence is no evidence of anticompetitive behavior, however.[32/] To the contrary, when cellular resellers complain about bulk discounts that are available only to high-volume affiliates of the facilities-based carriers, they are in effect asking for protection from competition from these affiliates, either in the form of a discriminatory low price applicable to low-volume resellers or in the form of umbrella pricing of high-volume service to the affiliates.[33/]

In short, there is no economic justification for Ohio's regulation of wholesale rates, and its request for authorization of such regulation should be denied.

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[31/] Id.

[32/] Id. at ¶ 46.

[33/] Id. at ¶ 41.

## Conclusion

Ohio's Petition is legally misguided and factually insufficient under the Commission's standards for authorization of either proposed or existing regulation. The Petition must be denied.

Respectfully submitted,

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September 19, 1994

D31605.2

**EXHIBIT A**

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

| | | |
|---|---|---|
| In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services | } | GN Docket No. 93-252 |

**Declaration of Bruce M. Owen on the Ohio Petition**

## I. Qualifications

1. I am an economist and president of Economists Incorporated, an economic consulting firm located at 1233 20th Street, N.W., Washington, D.C. 20036. I am also a visiting professor of economics at Stanford University's Washington, D.C. campus. I hold a Ph.D. in economics from Stanford University (1970) and a B.A. in economics from Williams College (1965). My fields of specialization are applied microeconomics and industrial organization, especially antitrust economics and regulation of industry. I have published a number of books and articles in these fields, including "*United States v. AT&T*: The Economic Issues" (with R. Noll, in J. Kwoka and L. White, eds., *The Antitrust Revolution*, Scott, Foresman, 2nd ed., 1994), *Video Economics* (with S. Wildman, Harvard University Press, 1992), and *The Regulation Game* (with R. Braeutigam, Ballinger, 1978). I have taught economics as a full-time member of the faculties of Duke University and Stanford University. From 1979 to 1981 I was the chief economist of the Antitrust Division of the United States Department of Justice. During 1971-1972 I was the chief economist of the White House Office of Telecommunications Policy. I have testified in a number of antitrust and regulatory proceedings, including ones relating to local ex-

change, interexchange, and cellular telephony as well as paging. A copy of my curriculum vitæ is attached to this declaration.

## II. Introduction and Summary

2. I have been asked by counsel for McCaw Cellular Communications, Inc., to provide an economic analysis of the "Petition of the State of Ohio for Authority to Continue to Regulate CMRS" FCC PR File No. 94-SP7, August 8, 1994 (Ohio Petition). This section summarizes my conclusions. Sections III through VI then examine the various factors that bear on the desirability of regulation of commercial mobile radio service (CMRS) providers. Section VII is a conclusion.

3. The Public Utilities Commission of Ohio (OPUC) itself makes no effort to demonstrate that current "market conditions with respect to such [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." In fact, the OPUC essentially admits that it cannot demonstrate a need for regulation: "Whether or not the FCC-mandated industry structure of only two providers per market, coupled with both current and future functional substitutes, will be sufficient to impose the degree of market discipline necessary to obviate any need for regulation remains to be seen in our view" (Ohio Petition at 1-2).

4. The Federal Communications Commission (Commission) should not grant Ohio's petition. The Commission has recently concluded that relevant markets are sufficiently competitive to justify forbearance from regulation of cellular and other CMRS providers (*CMRS Second Report*, 9 FCC Rcd 1411 (1994) at ¶¶135, 145). Nothing in the Ohio petition undermines this conclusion. This is true regardless of which CMRS prices one is considering, for example, wholesale prices for access, air time, roaming, or enhanced services.

5. The key question with respect to rate regulation is whether it is likely to be cost-effective in the future world to which it will be applied. It is generally acknowledged that the CMRS market is becoming more competitive as a result of changes in technology and various Commission ini-

tiatives that will permit or promote entry. Because regulation cannot be justified based on evidence regarding past and present conditions, clearly there is no basis for continuing or future regulation.

6. *First,* the Commission has already found that "CMRS providers do not have control over bottleneck facilities" (*CMRS Second Report* at ¶237). In the case of cellular carriers this conclusion is clearly correct. For example, new CMRS systems do not need to interconnect with cellular networks (as opposed to the facilities of local exchange carriers (LECs)) in order to enter the mobile communications market successfully.

7. *Second,* no one, including the OPUC, has demonstrated that the presence today of only two cellular providers in each area has resulted in anticompetitive behavior, including supra-competitive pricing.[1] Without such a demonstration, no case can be made for regulation of CMRS prices. Other parties that favor regulation of cellular carriers have offered analyses and data that allegedly demonstrate that cellular carriers have been exercising market power. None of them, individually or collectively, demonstrates the exercise of market power. Most of the claims about anticompetitive behavior are based on faulty economic analysis. By contrast, there is evidence of sufficient competitive behavior and benefits to consumers to justify continued forbearance from economic regulation.

8. *Third,* additional CMRS providers will soon offer competitive cellular-like services. As new CMRS providers establish themselves, any possibility that cellular carriers could acquire or exercise market power is eliminated. Entry by new competitors will be facilitated by the rapid growth in demand for and sales of mobile services.

9. *Fourth,* if state regulation of prices of cellular services were in the public interest, a state seeking to regulate prices should be able to demonstrate benefits from past state regulation. If there were benefits, one ought

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1 See my declarations analyzing the petitions of other states in this proceeding, and my declaration submitted in CC Docket 94-54 (In the Matter of Equal Access and Interconnection Obligations Pertaining to CMRS, September 12, 1994).

to be able to observe them by comparing states that regulated with states that did not. However, there is no evidence in the Ohio petition or elsewhere that regulation of cellular service prices in Ohio or other states has had any beneficial effect in the past.

10. *Fifth,* regulation of CMRS prices imposes substantial costs. Price controls limit the ability of regulated firms to respond to changes in technology and in cost and demand conditions, and deter new investments, quality improvements, introduction of new services, and entry by reducing returns on pro-competitive activities. The distortionary effects of price regulations that limit returns on investments are likely to be greatest in industries such as CMRS that are characterized by rapid growth, technological change, and relatively high risk.

11. Based on my review of the evidence, it is my opinion that there is no empirical basis for believing that there is a problem with market performance that would warrant regulating CMRS pricing. Thus, the Commission's conclusion that the market is sufficiently competitive to justify forbearance from regulation of cellular and other CMRS carriers is correct. State regulation of CMRS pricing would therefore be likely to harm consumers. There is nothing special about the nature of CMRS competition or regulation in Ohio that would change this conclusion.

## III. Market Structure and Performance

### A. Importance of Market Structure and Performance

12. In order to assess any potential regulation, it is useful to begin by considering the implications of leaving decisions to market forces. This is commonly done in an antitrust context by defining a relevant market and then evaluating market concentration, conditions of entry, and other structural and behavioral evidence relating to the likelihood that suppliers are exercising, or may come to exercise, unilateral or collusive market power. If market power is being exercised or is likely to be exercised in the future, then regulatory interventions may have benefits in preventing or stemming exclusionary or other anticompetitive behavior. Even if such benefits may result, however, they must be weighed against the fact that

the regulatory intervention will impose its own costs, distortions, and disincentives. It would be wrong to assume that an imperfect market can be replaced with perfect regulation.

## B. Market Definition

### 1. Purpose of Market Definition

13. To analyze competition, it is important to begin with properly defined antitrust markets. A group of products or services and an associated geographic area constitutes an antitrust market if it is the smallest set of products and the smallest area capable in principle of being profitably monopolized. In other words, if one assumed that a hypothetical single firm controlled the supply of all the products in question, and if that firm could increase its profits by raising prices significantly above competitive levels, then an antitrust market has been defined. However, if a price increase by a hypothetical single firm would be unprofitable because consumers would switch in significant numbers to other products, then the market has been defined too narrowly for antitrust analysis.

### 2. Relevant Product Markets

14. Cellular services may be competitive with certain landline services, such as intra-LATA toll service, pay telephone service, and telemetry service (*Financial Services Report*, May 25, 1994; *Electric Utility Week*, Aug. 29, 1994, at 7). Cellular services would be competitive with additional landline services but for the fact that residential local exchange services are priced below costs. For customers with relatively long local loops, landline service costs are likely to be similar to or greater than cellular service costs. To analyze some policy issues, it is therefore appropriate to define relevant antitrust markets that include both cellular and landline services. Nevertheless, for the purposes of the present declaration I make the conservative assumption that landline services are not in the relevant product market in which cellular and cellular-type services compete.

15. Among the relevant product markets in which cellular services may compete, the one that is now, and is likely to remain, most concentrated

is *mobile telecommunications services*, which I define as the collection of services of the type that cellular and broadband personal communications services (PCS) offer or will offer within the next three to five years. As I will explain further below, at a minimum the participants in this market include cellular providers and broadband PCS providers with at least 20-30 MHz of spectrum. Participants are also likely to include broadband PCS licensees with 10 MHz of spectrum and enhanced specialized mobile radio services (ESMR) providers with 5-10 MHz of spectrum. There may eventually be other participants as well, such as satellite-based services. Also, in some cases consumers are likely to be in a position to substitute landline telephone, paging, and two-way mobile radio services for cellular-type services.

16. The definition of the mobile telecommunications services market used in this declaration is based on the fact that cellular, PCS, and ESMR licensees are all authorized by the Commission to provide the full array of mobile services (Stanley M. Besen and William B. Burnett, "An Antitrust Analysis of the Market for Mobile Telecommunications Services," Charles River Associates, Dec. 1993, at 1 n.1, and at 17-18). It is also based on the conclusion that "all portions of the electromagnetic spectrum that have been allocated to the provision of mobile telecommunications services can be used to provide all of the same services and at about the same cost" (Besen and Burnett at 18).

17. My definition of a relevant antitrust product market for mobile telecommunications services is consistent with the analysis of Besen and Burnett, who define a single relevant antitrust market for all mobile services, including cellular, PCS, and ESMR. In their discussion of the market, Besen and Burnett include services such as paging that require only limited amounts of spectrum. However, in computing concentration in the market, they include only cellular providers, broadband PCS providers (which will have at least 10 MHz of spectrum as a result of Commission licensing), and—in some of their calculations—ESMR providers with 5-10 MHz of spectrum.

18. Cellular systems may also compete in narrower relevant product markets, such as *wireless data transmission services* and *paging services*. However, any such narrower product market that may exist would have more participants and be less concentrated than the market defined for mobile telecommunications services. Because of the additional competitors and scope for entry in a narrower market, insofar as the regulations at issue in the present proceeding are concerned no additional competitive issues are likely to arise in such markets that do not arise in a market for mobile telecommunications services.

### 3. Relevant Geographic Markets

19. Mobile telecommunications service suppliers compete in providing services in connection with both local and long-distance calls. The precise geographic areas appropriate for analysis of both local and long-distance calls is complicated by the fact that the relevant licensees (cellular A, cellular B, broadband PCS A and B, broadband PCS C-F, and ESMR) serve or will serve different, overlapping areas.

20. In order to define geographic markets in any specific situation, one must determine the extent of feasible geographic price discrimination. To the extent that price discrimination is not feasible, and uniform prices must be charged over a wide geographic area, geographic markets will be broader than if price discrimination is feasible. The broader are geographic markets, the greater will be the number of participants in the markets, and the lower will be concentration. For example, if the geographic market is broader than the Basic Trading Areas (BTAs) used for some of the broadband PCS licenses, the number of broadband PCS competitors in the market will exceed the number of licenses (including Major Trading Area (MTA) licenses) valid in any single BTA. The market share and concentration measures computed below, as well as those presented by Besen and Burnett and others, are likely to be biased upward because they are based on the implicit assumption that cellular licensees in different MSAs and PCS licensees in different BTAs are not in the same antitrust geographic markets (Besen and Burnett at n. 46 make the same point).

C. Competitors for Cellular in Mobile Telecommunications

1. Broadband Personal Communications Services (PCS)

21. Digital personal communications services are being licensed in two portions of the radio spectrum. Broadband PCS will be in the 1850-1990 MHz range, while narrowband PCS will be in the 900 MHz range. There will be three 30 MHz broadband licenses and three 10 MHz broadband licenses.

22. There is general agreement that at least the 30 MHz broadband PCS licensees will compete with cellular providers. One observer has predicted that "broadband PCS systems will evolve primarily into cellular competitors. ... [E]conomic factors all suggest that the larger PCS systems, say 30 MHz MTA-wide systems, necessarily must target cellular subscribers ... to become their customers" (*Cellular Business*, March 1994, at 14, 16). According to Commissioner Andrew C. Barrett, "The three 30 MHz allocations, two at the MTA level and one at the BTA level, will provide significant opportunities for new entrants to compete against cellular providers and the emerging Enhanced Specialized Mobile Services market. This new framework achieves one of my policy goals of ensuring that at least three new PCS providers have a real opportunity to offer competitive alternatives to existing cellular players" (*TR*, June 13, 1994, at 5). A Commission staff report suggests that competitive PCS services can generally be offered with 20 MHz of spectrum (David P. Reed, *Putting It All Together: The Cost Structure of Personal Communications Services*, Federal Communications Commission, Office of Plans and Policy, 1992, at vii-ix). In addition, the Commission has stated that "narrowband PCS services may compete with cellular to some extent" (*CMRS Second Report* at ¶148).

23. Industry predictions suggest that PCS systems may have advantages over cellular systems, for example, additional service options, superior voice quality, smaller, lighter, cheaper handsets, and perhaps lower costs (*TR Wireless News*, June 30, 1994). Time Warner Telecommunications has been testing a technology that would make use of existing cable television plant to reduce the cost of deploying PCS services (*Multichannel News*, June 6, 1994, at 2). According to one industry analysis, "Putting all